PD-0202-19
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
Transmitted 6/24/2019 6:38 PM
Accepted 6/25/2019 9:14 AM
DEANA WILLIAMSON
CLERK

NO. PD-0202-19

FILED
COURT OF CRIMINAL APPEALS
6/25/2019
DEANA WILLIAMSON, CLERK

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF TEXAS
AUSTIN, TEXAS

ALBERTO MONTELONGO
Appellant

v.

STATE OF TEXAS
Appellee

PETITION FOR DISCRETIONARY REVIEW FROM THE EIGHTH COURT OF APPEALS, EL PASO, TEXAS
APPELLATE CAUSE NUMBER 08-16-00001-CR

BRIEF OF APPELLANT ALBERTO MONTELONGO

Respectfully submitted,

/s/ Joe Spencer
JOE A. SPENCER
1009 Montana
El Paso, Texas 79902
915-532-5562
(915-532-7535) (Fax)
State Bar No. 18921800

TABLE OF CONTENTS

IDENTITY OF JUDGE, PARTIES, and COUNSEL

IDENTITY OF INTERESTED PARTIES, COUNSEL, AND TRIAL JUDGES:

FOR APPELLEE, THE STATE OF TEXAS:

TRIAL COUNSEL:
John Patrick Briggs, ADA
Nathan Lee Brown, ADA
Office of the District Attorney
34th Judicial District
500 E. San Antonio, 2nd Floor
El Paso, Texas, 79901
Phone: 915-546-2059

APPELLEE COUNSEL:
Mr. Jaime Esparza, District Attorney
El Paso County, Texas,
Address and phone above.

FOR APPELLANT, ALBERTO MONTELONGO:

TRIAL COUNSEL:
MIGUEL J. CERVANTES
1013 Montana Ave.
El Paso, Texas 79902

APPELLATE COUNSEL:
RUBEN P. MORALES
State Bar No. 14419100
718 Myrtle Avenue
El Paso, Texas 79901
(915) 542-0388
(915) 225-5132 fax

TRIAL JUDGE:
THE HON. LUIS AGUILAR
243rd District Court
500 E. San Antonio, 9th floor
El Paso, Texas 79901

INDEX OF AUTHORITIES

Federal Cases

State Cases

Statues

STATEMENT OF THE CASE

Appellant, Alberto Montelongo (hereinafter "Montelongo") was indicted for one count of Attempt to Commit Capital Murder of Multiple Persons, four counts of Aggravated Assault With a Deadly Weapon, and one count of Assault Causing Bodily Injury, Family/Household Member, Two or More Times Within 12 Months. CR 9-15. After a jury trial, Montelongo was found guilty of Attempt to Commit Capital Murder of Multiple Person, and he was sentenced to 99 years imprisonment and a $10,000.00 fine. CR 251. Montelongo was also found guilty of Assault Causing Bodily Injury, Family/Household Member, Two or More Times within 12 Months. CR 253. For this crime, Montelongo was sentenced to 10 years imprisonment and a $10,000.00 fine. *Id.* On October 30, 2015, Montelongo filed a motion for new trial alleging ineffective assistance of trial counsel and due process violations, deprivation of right to trial by impartial jury, and deprivation of right to counsel resulting from the trial court's actions. CR 263. The motion for new trial included a request for a hearing. CR 269. On November 19, 2015, the trial court entered an order setting a December 8, 2015, hearing on Montelongo's motion for new trial. CR Supp (December) 5. On November 23, 2015, the trial court *sua sponte* entered an order canceling the December 8, 2015 hearing. CR Supp (December) 8. No written order was entered deciding Montelongo's motion for new trial. Therefore, the motion was overruled by operation of law on December 14, 2015 (75

days after Montelongo was sentenced in open court). *See* Tex.R.App.P. 21.8. Montelongo timely filed his notice of appeal of December 29, 2015. CR 277.

STATEMENT OF PROCEDURAL HISTORY

The Eighth Court of Appeals affirmed the trial court's judgment on August 31, 2018. Appellant filed a motion for rehearing on December 14, 2018, which was denied on January 9, 2019. Appellant filed Petition for Discretionary Review on March 14, 2019, which was granted on May 8, 2019.

ISSUE PRESENTED

Whether or not the 8th Court of Appeals erred in finding that Appellant waived his right to a hearing on a properly presented and filed motion for new trial?

STATEMENT OF FACTS

It was alleged that on or about February 2, 2015, Montelongo attempted to murder two individuals in one criminal transaction, to wit: Jesus Rodriguez and Angelica Parra. R. 4:11. It was also alleged that on or about January 29, 2015, and on or about February 2, 2015, Montelongo intentionally, knowingly, or recklessly caused bodily injury to Angelica Parra, a member of the defendant's family or household, during a period that was 12 months or less in duration. R. 4:13.

STATE'S CASE

Verlimirovic Bratislav

Bratislav was the doctor that treated Jesus Rodriguez on February 3, 2015, for a gunshot wound to the head. R. 4:28. He described two surgical procedures undergone by Rodriguez, and he opined that most bullet shots to the head are fatal. R.4:41. Based on the trajectory in the head, Bratislav could not say what angle the gun was pointing when it was fired. R. 4:49.

Blanca Votta

Votta was a Crime Scene Investigator. R. 4:51. On February 2, 2015, she was sent out to the scene of 13926 Bradley. R. 4:53. She took pictures and collected a gun, casings, and a knife as evidence. R. 4:54. She speculated that the kitchen utensils strewn about the floor of the kitchen indicated there had been a struggle there. R. 4:69. Votta stated that the knife had a bloodstain on it. R. 4:75. The gun

had a bullet with holes in the casing, chambered into the barrel. R. 4:78-80. She gathered Rodriguez's clothes from the hospital and found two condoms in one of his pockets. R. 4:86.

Martin Hernandez

Hernandez was an operations officer with the U.S Border Patrol. R. 4:97. He stated that Border Patrol Agents are trained in the use of firearms. 4:97 Agents are taught which bullets go with different guns, how to put bullets into a magazine, how to load a magazine into a gun, and how to point and aim at a target. R. 4:97-98. He explained that, when aiming at a target, they are taught to use various stances to include the isosceles stance. R. 4:98. The isosceles is a stance where you square up toward your target with your shoulders straight. R. 4:99. Hernandez stated that in the early morning hours of February 3, 2015, he was called to respond to a barricade incident. R. 4:101. He learned that Montelongo was involved. R. 4:103. Hernandez knew that Montelongo was a firearms instructor and taught firearms safety with the Border Patrol. R. 4:103. Hernandez explained that accidental shootings could happen on the firing range or anywhere an agent handles his weapon. R. 4:104. He also agreed that an individual might take the isosceles stance when he perceives a danger, but that does not always equate with a dangerous situation. R. 4:107.

Daisy Parra

Daisy was the 18-year-old daughter of complainant Angelica Parra. R. 4:110-111. On the day of the shooting, she had been going back and forth between doing laundry and texting. R. 4:113. Her mother's friend Jesse was planning on going over that night to watch movies with them. R. 4:114-115. On that night, when Jesse arrived, Daisy was in her room. R. 4:115. Daisy heard Jesse's voice from her room and later, the angry voice of Montelongo. R. 4:115. Daisy came out of her room and saw Montelongo holding a gun with both hands, pointing it at Jesse, with his hand on the trigger. R. 4:123. Montelongo was about five or six feet from Jesse. R. 4:123. At that point, she could not see where her mother was located. R. 4:124. Montelongo saw Daisy in the hallway and called her name, telling her to "get over here." R. 4:125. When she heard that, Daisy ran to her room to call the police. R. 4:125. She called 911 from the bathroom. R. 4:126. Daisy could hear her mother whining and Montelongo screaming. R. 4:127-128. At one point while she was still on the call, she heard a gunshot. R. 4:128. At that point, Daisy decided to get out of the house through her bedroom window. R. 4:129. Once outside of the house, she saw a sheriff and ran to him. R. 4:130. Daisy said that she had known Montelongo for about eight years since she was about ten. R. 4:133. She did not get along with him. R. 4:138. Although her mother and Montelongo argued a lot, she had never seen them get

physical. R. 4:133. Montelongo did live at the house, but he hardly stayed there, and she did not know if he had belongings there. R. 4:139.

Jerome Washington

Washington was a detective with the El Paso County Sheriff's Office. R.4:143-144. On February 3, 2015, when he arrived at 13926 Bradley, he was told that someone had been "holed up" inside the house for more than four hours. R. 4:148. The Swat Team was there and had deployed a robot into the house. R. 4:148. The robot is used to facilitate communication with individuals, and it also has a camera for visuals. R. 4:148-149. Washington identified pictures from the robot, which showed Montelongo holding a gun in his hand; Angelica Parra was also in the picture. R. 4:152-153.

Richard Pryor

Pryor was another crime scene investigator with the Sheriff's Department. R. 4:161. He identified a vehicle found on Desert Willow. R. 4:167-168. The car was a 2009 maroon Honda belonging to Montelongo. R. 4:172. Pryor said the vehicle was 571 feet from the Bradley residence garage door. R. 4:172. He did not know why the car was there or how long it had been there. R. 4:173.

Blanca "Angelica" Parra

Parra was a border patrol supervisor at the Las Cruces, NM border patrol station. She met Alberto Montelongo in October 2003 at a border patrol academy.

R. 5:10 11. From 2003 to 2014 they had an on again, off again relationship. R. 5:11. They married on February 18, 2014, and separated in July of 2014. R. 5:11-12. They tried to reconcile after that, but it did not happen because Montelongo did not want to move back to the house. R. 5:13-14. Parra said that Montelongo had a lover that she found out about in June or July of 2014. R. 5:14. By December of 2014, Parra no longer wanted to work out the relationship. R. 5:14.

Jesus "Jesse" Rodriguez was a friend that Parra met on plentyoffish.com. R. 5:15. When she created a profile on that website, she specified that she was looking for friends. R. 5:16. Parra and Rodriguez started texting in mid-December of 2015 and did not meet in person until January of 2015.R. 5:18-19. By January 29, 2015, Parra and Rodriguez had gone on a total of three dates but had not had sex. R. 5:21.

On the night of January 29, 2015, Parra was asleep in her bedroom and was awakened by the sound of her bedroom door opening. R. 5:21. Montelongo came into her bedroom and told her he wanted to work things out. R. 5:22. Parra said she told Montelongo that she did not want to work things out because she was tired of his lies. R. 5:23. She stated that Montelongo told her he had spoken to God, who had told him to get his woman to submit to him. R. 5:24. Parra laughed at him, and Montelongo got mad. R. 5:24-25. He kept trying to convince her, but she told him she did not want to talk to him anymore and grabbed her iPad and started ignoring him. R. 5:25. She testified that at that point, Montelongo grabbed her by her hair and

started banging her head against the headboard. R. 5:26. Parra felt like she was going to black out, but she did not. R. 5:27. Montelongo told her in Spanish that she "deserved this for being a whore." R. 5:27. After that, he got up and walked to the garage, got in his car, and left. R. 5:29. After Montelongo left the residence, Parra discovered that she had injuries to her face. R. 5:31. Parra reported the incident to the Sheriff. R. 5:32. Afterward, Montelongo asked Parra if she had called the Sheriff and whether he would be arrested. R. 5:32.

On the night of February 2, 2015, Rodriguez went over to Parra's home to watch a movie with Parra and her daughter, Daisy. R. 5:33. He arrived just after 10 p.m. R. 5:34. Parra and Rodriguez were in the kitchen with Parra showing Rodriguez a game on her iPhone, when Parra heard the click of the front door opening. R. 5:36-37. She saw Montelongo entering and immediately addressing Rodriguez with "What the fuck are you doing in my house?" R. 5:37. Parra explained that Montelongo immediately began questioning Rodriguez about having sex with his wife, wanting to know how many times they had had intercourse. R. 5:38. Parra stated that she thought that they might get into a fight, so she stepped in between them. R. 5:38. She said that Montelongo had his hands inside his pockets. R. 5:40. When he took his hands out of his hoodie, he had a gun, which he pointed at Rodriguez. R. 5:41. Parra said that she tried to explain to Montelongo that they had

done nothing, but Montelongo ignored her and continued questioning Rodriguez. R. 5:42.

At one point, Montelongo told Parra to get on her knees and call her daughter to come over to where they were. R. 5:45. Parra refused to get on her knees and called her daughter once, but then stopped calling for her because she thought the if she came, Montelongo would hurt her. R. 5:46. She then felt Jesse's hands on her shoulders, moving her, using her as a shield. R. 5:46. Montelongo told Rodriguez, "What a brave man." R. 5:46. Parra then heard a shot. R. 5:47. Right before she heard the shot, she saw Montelongo close one eye and then she felt her fingers burning. R. 5:47-48. After the shot, her ears started to ring, she no longer felt Jesse's hands on her, and she heard something hit the floor. R. 5:49.

Parra saw Rodriguez on the floor bleeding. R. 5:49. Montelongo lowered the gun and pointed at her midsection. R. 5:50. She heard a click, but the gun did not fire. R. 5:51. At that point, she grabbed the slide of the pistol with one hand and put her other hand on top of Montelongo's hand. R. 5:51. Montelongo told her to let the gun go, and they fought for the gun. R. 5:52-53. The struggle led them to the kitchen. R. 5:54. Once in the kitchen, Montelongo opened two drawers and found the kitchen knives in the second drawer. R. 5:56-57. When Montelongo grabbed one of the knives, Parra let go of the gun and grabbed Montelongo's hand, which was holding the knife. R. 5:57. While they were struggling for the knife, they heard a noise and

Montelongo said he thought it was the police who were going to enter. R. 5:60. Montelongo then stated that they were going to shoot him and grabbed the gun with one hand and pointed it at his head, while still holding on to the knife with his other hand. R. 5:61. Parra said that at that point, they stopped fighting. R. 5:61. When asked where Rodriguez was during all of this, Parra recalled that while they had been struggling for the pistol, she had seen Rodriguez staggering and holding his head. R. 5:62.

Montelongo talked about getting shot by cops and not being afraid to die. R. 5:64. She offered to help him escape and tried to convince him to let go of the knife, but he would not. R. 5:65. Montelongo said he could not go to jail, and he could not live seeing her with someone else. R. 5:66. Eventually, Parra saw an opportunity and ran out of the house. R. 5:68. Parra said that after she managed to escape, Montelongo stayed in the house for about another hour. R. 5:73.

Parra agreed that while at the Border Patrol Academy, Montelongo helped her a lot throughout the whole academy. R. 5:76-77. Parra agreed that she was on the website plentyoffish.com while she was still married to Montelongo. R. 5:78-79. She knew George Mendez, Sergio Martinez, and Jorge Landeros. She admitted to having a sexual relationship with George Mendez. R. 5:81. She told Montelongo about the sexual relationship, but after it got very ugly, she told him it was a lie. R. 5:81. Parra acknowledged that the house on 13926 Bradley was as much Montelongo's as it was

hers. R. 5:82. They had owned the property for over a year, but Montelongo had only lived in the house for about six weeks. R. 5:83. Parra could not explain how she got the injuries to her face on January 29, 2015, when Montelongo was slamming the back of her head on the headboard. R. 5:91. Parra could not tell if the muzzle of the gun was hot or not when she grabbed it after Montelongo had shot Rodriguez. R. 5:98-100. Parra said Montelongo threatened to kill her and himself. R. 5:106.

Jeffrey Kelly

Kelly was a firearms examiner with the Department of Public Safety. R. 5:109. He said there were markings on the bullet casing found in the gun chamber that indicated somebody had tried to fire it. R. 5:130-131. He could not say why the gun misfired. He also could not say that the circular marks on the casing were from the firing pin on the gun, although the shape was the same. R. 5:134 Kelly agreed that the barrel of a weapon warms up when fired. R. 5:150.

Jesus Rodriguez

Rodriguez met Parra through a social media dating application called Plenty of Fish. R. 6:7. Parra never told him she was married but did tell him she was separated. R. 6:9. On February 2nd, he and Parra were sitting in the kitchen playing a game, when the front door flung open, and Montelongo walked in. R. 6:14. Montelongo walked over to him and demanded to know why he was in the house. R. 6:15-16. Montelongo said this is going to finish right now and pulled out a gun.

R. 6:16-17. Montelongo pointed the gun at their chest area from about five or six feet away. R. 6:19. A short time later, the gun went off, and he felt blood dripping from his forehead, but he could not recall falling to the ground. R. 6:20. Rodriguez crawled into a restroom in the hallway. R. 6:21.

Once in the bathroom, Rodriguez immediately looked at himself in the mirror to see where he had been hit. R. 6:21-22. He saw an entry wound above his right eye, and he grabbed a towel and applied direct pressure to his forehead. R.6:22. Rodriguez called 911, and he was told that the sheriff's officers were already there waiting to enter the residence and that one of the deputies was going to be calling him. R. 6:24. The SWAT team got Rodriguez out of the house, and he was taken to Del Sol Medical Center, where he underwent surgery. R. 6:26-27. Based on what Rodriguez saw and heard, he said that the February 2nd incident had not been an accident. R. 6:29.

THE DEFENSE'S CASE

Alberto Montelongo

On February 2, 2015, Montelongo was employed by the United States Border Patrol. R. 6:43. When he met Parra, it was as classmates and study partners at the Border Patrol Academy. R. 6:43. Parra joined the Academy on the same day as Montelongo. R. 6:45. While at the Academy, their relationship became romantic and intimate. R. 6:45-46. After he and Parra graduated from the Academy in 2004,

Montelongo left his family and Parra became his girlfriend. R. 6:46. Their relationship was sometimes good and sometimes horrible. R. 6:46. They dated for about 11 years and ultimately got married in 2014. R .6:46-47. They had disputes about kids, family, finances, and just about everything. R. 6:47. Montelongo stated that they also had arguments about other men getting involved in their relationship. R. 6:47. Over the years, they spoke about divorcing at least 20 times, but Montelongo's position was just to split up, take what you own, and part ways. R. 6:48.

On the 29th, Montelongo went to the Bradley house because that is what had been arranged two days before. R. 6:48-49. The arrangement they had made was to talk about fixing their marriage. R. 6:49. When he went over, he had dinner with Parra, Parra's daughter Daisy, and Daisy's Boyfriend. R. 6:49. After dinner, they played Clash of Clans for about 30 minutes and then decided to move to the bedroom. R. 6:49. In the bedroom, Parra laid down on the bed, put a pillow on her lap, an iPad on top of the pillow, and started playing Clash of Clans. R. 6:49-50. They talked about reconciling for about 20 minutes, but when they could not see eye to eye, they started talking about getting a divorce instead. R.6:50.

Montelongo brought up the issue of a $50,000 loan he had obtained for her and Parra started ignoring him. R. 6:50. He became aggravated, and after about two minutes, he tried to take the iPad away from Parra. She grabbed the pillow and put

it up against her face with the iPad in between. R. 6:51. He tugged at it a few times, but then it slipped, and her head bounced back on the headboard. R. 6:51. Montelongo stated that he did not purposely strike Parra. R. 6:51. He denied inflicting any of the injuries shown on Parra that night. R. 6:51. On January 30th, Montelongo went to jail and was released about six to eight hours later. R. 6:54.

Once released from jail, he went to his workstation where he was served with paperwork telling him he was being placed on administrative leave. R. 6:54-55. He was asked to relinquish his badge, credentials, duty belt, holster, handcuffs, and service weapon. R. 6:55. On the morning of Monday, February 2nd, the day of the shooting, Montelongo went to work at 7 a.m. R. 6:56-57. That evening, he went to Parra's home because he needed to get some things from her house and give her the mortgage money. R. 6:57.

Earlier that day, before he went over, he had spoken to Parra, and they were talking about making plans to talk about trying to fix their relationship again. R. 6:58. While they were talking on the phone, Parra answered another phone call, and when she got back to Montelongo, she had changed her mind. R. 6:58. She told Montelongo, "Let's let the courts handle it." R. 6:58. Since Montelongo still needed to pick up his things, he went over anyway. R. 6:58. When he got there, he parked in an empty lot behind the house because he knew that if Parra saw his car, she might

not talk with him. R. 6:59. He wanted to give her the mortgage money, get his things, and speak to Parra about why she had called the cops. R. 6:59.

As Montelongo was walking towards the house, he saw a vehicle that he did not recognize pull into the driveway. R. 6:59. Montelongo went to the front of the house, and he could see Parra and Rodriguez inside the house hugging and kissing. R. 6:60. Montelongo tried to unlock the front door, but then he remembered that the lock on the front door was broken because a key had previously broken inside the lock and the door could not be opened. R. 6:60. Because of this, he went around through the garage. R. 6:60. While inside the garage, Montelongo remembered that Parra kept an old pistol in a box in the garage. R. 6:60. He grabbed the gun and put it in his sweater's pocket. R. 6:63.

Once inside the house, he went to the front door, unlocked it from the inside, opened it, and closed it. R. 6:63. He then turned around, and both Parra and Rodriguez were looking at him. R. 6:63. Montelongo asked Rodriguez if Parra had told him that he taught her that game. R. 6:63-64. Rodriguez and Parra both stood up and took a couple of steps towards Montelongo, and that is when Montelongo took a couple of steps back, drew his pistol, and began with the foul language. R. 6:64. Rodriguez then tried to grab the gun from Montelongo but missed. R. 6:65.

After that, Rodriguez grabbed Parra and put her in front of him. R. 6:66. They started moving back towards the hallway through the kitchen. R. 6:66-67.

Montelongo was yelling at Rodriguez to get away from his wife and get out of his house. R. 6:66-67. After they went into the hallway, Montelongo could not see them well because it was dark. R. 6:67. Before Parra and Rodriguez started to move, Montelongo heard Daisy, Parra's daughter come out of her room. R. 6:68. He called her over to her because he did not want her to call the police. R. 6:68. He wanted to diffuse the situation and leave without any trouble. R. 6:68. Daisy said no and walked back into her bedroom. R. 6:68.

When Parra and Rodriguez turned the corner, all he could see was black silhouettes. R. 6:68-69. He heard someone say, "I'll get out of here." At that point, everyone stopped. He then felt a tug on the gun, and it went off. R. 6:69. He believed it was Parra who tugged on the gun. R. 6:69. When the gun went off, Montelongo was shocked. R. 6:70. Montelongo did not know he had hit Rodriguez until he saw him fall to the ground. R. 6:70. Montelongo just stood there, and then Parra went at him and grabbed the gun. R. 6:70-71. He struggled with Parra for the gun but did not attempt to discharge it again during their struggle. R. 6:71.

Montelongo said he attempted to go for a knife because, at that point, he did not want to live anymore—he wanted to kill himself. R. 6:71. He went for a knife a second time, and that time he was able to grab a knife, along with Parra, who grabbed it with both hands and cut herself. R. 6:72. After the first shot went off, the gun jammed, and Montelongo hit it to try to make it load another round. R. 6:72. He was

successful in getting the gun to load again and held it to his throat. R. 6:73. Montelongo never struck Parra with the gun, and he never tried to shoot her. R. 6:73.

While Montelongo and Parra were struggling with the knife, they went towards the front door, past the first hallway. R. 6:173. At some point, police officers or sheriffs started arriving. R. 6:74. Montelongo and Parra began arguing about their entire relationship and about who had been at fault. R. 6:74-75. Montelongo said he never kept Parra from leaving and he told her to leave him, to go, to get away, to leave the house. R. 6:75. Parra told Montelongo to leave, to hide, to run away, and to hide in the attic. R. 6:75. While he was in the house with Parra, he talked to the police through the robot they sent in. R. 6:76. He was in the house about four or five hours after the police arrived. R. 6:76. After three times of standing up and going to the front door, Parra left the house. R. 6:76. Montelongo's intention when he went to the Bradley house was to try to talk to Parra and to calm her down about the previous arrest. R. 6:77.

Montelongo knew how to use firearms but did not believe he was very good at it until he got training and experience with the Border Patrol. R. 6:84-85. With the Border Patrol, he became a firearms instructor and a range safety officer. R. 6:85. During his 11-year career with the Border Patrol, Montelongo figured he had taught between 200 and 500 people how to shoot. R. 6:86. On February 2nd, Montelongo went to the Bradley house to give Parra the mortgage payment, pick up some of his

things, and to try to talk to Parra about dropping the charges against him. R. 6:97. When he picked up the gun in the garage, Montelongo was not really thinking about whether the gun was loaded and ready to fire—he just put it in his pocket. R. 6:99. He had picked up the gun because he had seen that there was a guy he did not know with his wife. R. 6:98. Montelongo did not pull the gun out of his pocket until Rodriguez came at him. R. 6:102-103.

When Rodriguez tried to reach for the gun, Montelongo took a step back, and Rodriguez missed the gun. R. 6:105. When the gun went off, Montelongo had not meant to shoot—it was an accident. R. 6:105. He saw Rodriguez go down and stood there in shock. R. 6:105-106. Montelongo did not check on Rodriguez because he was struggling with Parra for the gun. R. 6:06-107. During the struggle for the gun, Montelongo banged the gun on the kitchen table to try to clear the gun because he was preparing to kill himself. R. 6:110-111.

SUMMARY OF ARGUMENT

Appellant asserts that he was deprived of his right to due process, a fair and impartial jury, and effective assistance of counsel as a result of the trial court's abuse of discretion in failing to hold a hearing on Appellant's properly filed and presented motion for new trial. The 8th Court of Appeals resolved Appellant's issue by finding waiver. The finding of waiver is unwarranted.

ARGUMENT

A. Relevant Facts

A jury found Montelongo guilty of attempted capital murder and assault on a family member, 2 within 12 months. R. 7:131. On September 30, he was sentenced to 99 years and 10 years respectively, for each count. R. 7:131. Montelongo filed a timely motion for new trial on October 30, 2015, which specifically requested that the court grant him a hearing on his motion for new trial. CR. 263. The matter was set for a hearing by the court, but subsequently, the hearing was canceled without an explanation. CR. 29. The court did not reset the matter for a hearing, and the motion was overruled by operation of law.

B. Legal authority

"When an accused presents a motion for new trial raising matters not determinable from the record, which could entitle him to relief, the trial judge abuses his discretion in failing to hold a hearing" *King v. State*, 29 S.W.3d 556, 569 (Tex.Crim.App.2000). The purpose of the hearing is to develop the issues raised in the motion fully. *Jordan v. State*, 883 S.W.2d 664, 665 (Tex.Crim.App.1994). As a prerequisite to obtaining a hearing, the motion must be supported by an affidavit specifically showing the truth of the grounds for attack. *King v. State*, 29 S.W.3d at 569; *Reyes v. State*, 849 S.W.2d 812, 816 (Tex.Crim.App.1993). The affidavit need not reflect each and every component legally required to establish relief, but rather

must merely reflect that reasonable grounds exist for holding that such relief could be granted. *Jordan v. State*, 883 S.W.2d at 665; *Reyes v. State*, 849 S.W.2d at 816.

C. Argument

In this case, Appellant raised ineffective assistance of counsel as one of several grounds for the granting of a new trial. CR. at 263-274. An affidavit accompanied the motion from Appellant's trial attorney, which contained sufficient facts supporting a claim that counsel had been ineffective. CR. at 271-273. The motion for new trial was also sworn to by appellate counsel. In the affidavit, trial counsel admitted that he was intimidated by the trial court into limiting his voir dire and that he failed to conduct a full and thorough voir dire, out of fear of being held in contempt. CR. at 271-274.

Counsel was ultimately held in contempt at the conclusion of voir dire, not because he meet the definition of what a contempt charge is meant to be which is conduct that obstructs or tends to obstruct the proper administration of justice but simply because the Judge was annoyed and had demanded “silence” from trial counsel during a conversation with the excused jury venire R. 3:109; 118; *Ex parte Taylor*, 807 S.W.2d 746, 748 (Tex. Crim. App. 1991). Trial counsel was also threatened or reminded of possible contempt on many other occasions. R. 3:76; 4:10; 5:100; 7:46. In addition, trial counsel stated in his affidavit that because he was held in contempt early on by the trial court, trial counsel did not zealously cross-examine

witnesses, he was reluctant to make objections during trial, and his overall performance was lacking. *Id.*

In essence, defense counsel admitted there was a conflict of interest that prohibited him from providing effective assistance of counsel. *See Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980)(finding violation of the Sixth Amendment's right to effective assistance of counsel if there is an actual conflict of interest [including counsel's own self-interest] that adversely affects defense counsel's performance.) According to this Court, in cases like this one where a defendant was actually or constructively denied the assistance of counsel altogether, if counsel was prevented from assisting the accused at a critical stage of the proceedings because of some type of state interference, or if counsel was burdened by an actual conflict of interest which adversely affected counsel's performance then it is unnecessary for a defendant to meet the prejudice requirement of *Strickland*. *Mitchell v. State*, 989 S.W.2d 747, 748 (Tex. Crim. App. 1999); *see Strickland v. Washington*, 466 U.S. 668 (1984) (establishing a two-part test for an ineffective assistance of counsel claim: Counsel's performance fell below an objective standard of reasonableness; and Counsel's performance gives rise to a reasonable probability that if counsel had performed adequately, the result would have been different).

Trial counsel further admitted that he failed to investigate Appellant's mental health issues despite being aware that Appellant was depressed, suicidal, and had

seen combat duty. CR. at 271-274. This is deficient performance because "the sentencing stage of any case, regardless of the potential punishment, is the time at which for many defendants the most important services of the entire proceeding can be performed." *Milburn v. State*, 15 S.W.3d 267, 269 (Tex. App.—Houston [1st Dist.] 2000, pet. ref'd) (quoting *Vela v. Estelle*, 708 F.2d 954, 964 (5th Cir. 1983)). Such was the case in *Barnett v. State*, 338 S.W.3d 680 (Tex. App. 2011). There, the appellate court reviewed the defendant's contention that his trial counsel failed to present mitigating evidence. He asserted that he suffered from "various mental illnesses, including being bipolar," and "has had treatment at MHMR." *Id.* at 686. However, during the sentencing hearing, counsel failed to put on this mitigating evidence as to the defendant's mental health.

The appellate court in *Barnett* agreed with the defendant and found that his counsel provided deficient assistance. The court agreed that there was no evidence presented during the sentencing hearing. However, it also noted that there was no testimonial evidence as to the defendant's mental health. Without that evidence, the court concluded that the defendant's "[c]ounsel's reasoning is not apparent from the record . . . . Without such a record as might be developed at a hearing [, the court] would not be able to decide the issue of whether counsel's performance was deficient." *Id.* In the case at hand, had the trial court not abused its discretion by *sua sponte* canceling the motion for new trial hearing Appellant would have had the

opportunity to show the truth of the grounds set forth in his motion and the attached affidavit.

Trial counsel also admitted that he did not interview and/or present relevant punishment witnesses to include Appellant's parents, siblings, and other family members and friends, all of which were present and available at Appellant's trial. CR. at 271-274. *See Milburn v. State*, 15 S.W.3d 267, 270-71 (Tex. App. – [14th Dist] 2000, pet. ref'd)(finding trial counsel ineffective for failing to investigate and present mitigating evidence that consisted of at least twenty witnesses available to testify on appellant's behalf regarding matters such as appellant's fitness as a father and as an employee). *See also Ex parte Welborn*, 785 S.W.2d 391, 393 (Tex.Crim.App.1990)(explaining that a criminal defense lawyer has a duty to make an independent investigation of the facts of a case, which includes seeking out and interviewing potential witnesses). Finally, trial counsel cited personal health concerns and fear of incarceration for contempt, as reasons for his deficient performance in his representation of Appellant. CR. at 271-273.

Defense counsel's affidavit show that his main concern was self-preservation and thus an actual conflict of interest existed in which counsel could not dually represent his own as well as his client's interest effectively or ethically. Trial counsel was not functioning as counsel envisioned by the Sixth Amendment as he candidly admitted in his affidavit, that he was not zealously defending his client. Many of

these admissions are borne out by the record. Beginning with voir dire, the State's voir dire was 57 pages long while defense counsel's voir dire was 17 pages long. R. 2:10-67; 67-85. Defense counsel was threatened with contempt during voir dire and was told unequivocally that the court would take voir dire away from him if he continued with what the court considered objectionable behavior. R. 2:76. Immediately after this threat, defense counsel side-stepped a question by a juror requesting a more detailed explanation of the question being asked. R. 2:77. A short while later, defense counsel was admonished to refrain from asking inappropriate questions. R. 2:81. The trial court then questioned that particular juror itself, in essence, beginning the process of taking voir dire away from defense counsel. R. 2:81.

A review of defense counsel's voir dire reveals no salient defensive strategy. Defense counsel failed to address any punishment issues, merely asking the jury panel if they stood by their original answers to the State regarding the range of punishment. R. 2:85. Defense counsel made no effort to discuss issues related to theories of punishment, jurors' ability to be fair to a law enforcement officer accused of a crime, jurors that might be biased because they or someone they knew were victims of crimes and, whether jurors could be fair in a case that involved the attempted killing of more than one person. Defense counsel's limited voir dire supports his statement in his affidavit that he did not cover areas of law that were

relevant because he feared being held in contempt. CR. at 272. During the trial, State's exhibits were admitted without objection. These included inadmissible and highly inflammatory photos of one of the victims in his hospital bed along with photos of this victim, showing the effects of surgical procedures performed on him. SX-1, SX-2, SX-5, SX-6, and SX-7.The surgical procedure involved removing a portion of the victim's scalp, thus leaving a significant indentation in the head. In addition to the photos, the victim displayed his scars and injuries to the jury. R. 6:29. The victim also testified, without objection, as to the specifics of his surgeries, the possible complications associated with his surgeries and, the potential complications resulting from being shot in the head. R. 6:26-29. Appellant asserts that this evidence was not relevant, and it was also inadmissible under Ruler 403 of the Texas Rules of Evidence. *See Kelly v. State*, 22 S.W. 3d 642, 645(Tex. App. – Waco, 2000 pet. ref'd)(finding gruesome photos of gunshot had little probative value when it was undisputed the victim was shot. Consequently, the court erred in admitting such photos.)

During punishment, defense counsel called two witnesses aside from Montelongo. The only substantive question asked of these witnesses was whether Montelongo had a reputation for being peaceful and law-abiding or for being a good person. R. 7:85, 89. At one point, Montelongo's sister appeared to be attempting to provide additional background information regarding Montelongo, but the State

objected. R. 7:89. Defense counsel then simply asked the sister about his reputation for being a good person. R. 7:89.

Consequently, defense counsel's affidavit admitting that he was deficient in presenting mitigating and character evidence at the punishment stage of the trial is borne out by the record. Mitigating evidence clearly would have been admissible. *Milburn v. State*, 15 S.W.3d 267, 271 (Tex. App. 2000). Defense counsel's failure to search out and present any mitigating character evidence constituted ineffective assistance of counsel. *See, Ex parte Felton*, 815 S.W.2d 733, 737 n. 4 (Tex.Crim.App.1991).

Appellant further alleged in his motion for new trial, that the trial court's comments during voir dire improperly chilled the honest exchange of information between the potential jurors and the litigants. CR. 271-273. As a result, Appellant claimed that he was deprived of due process, trial by an impartial jury and the right to counsel. This allegation was supported by trial counsel's affidavit in which he described the manner in which he believed the trial court intimidated the jurors. CR. at 271-272. These allegations are also borne out by the record, which at times, shows the trial court intimating to jurors that any indication by them that they could not be fair would not be acceptable. R. 3:54-60; 3:66.

Two jurors stated that they could not judge others because of religious beliefs, and they were both mocked and criticized by the judge. The exchange with juror 5, who had previously mentioned serving as a grand juror, is as follows:

> The Court: Excuse me. Juror Number 5?
> Venireperson Rivera: Yes, sir.
> The Court: Are you not serving on a grand jury?
> Venireperson Rivera: Yes, I am.
> The Court: Do you not judge 20 to 30 people every session? Did you just tell him you can't judge someone on–
> Venireperson Rivera: Yes, but–
> The Court: –religious grounds?
> Venireperson Rivera: Right.
> The Court: You do it every day.
> Venireperson Rivera: Yeah, but this is a murder.
> The Court: No, it's not.
> Prosecutor: No. It's an attempted murder.
> Venireperson Rivera: Okay
> The Court: Ma'am, you are on a grand jury.
> Venireperson Rivera: Yes.
> The Court: Do you realize what happens when you guys sign that?
> Venireperson Rivera: Yes.
> The Court: That means you just passed judgment and you indicted somebody. And every day that you go up there, you're doing 20 to 30 felony indictments.
> Venireperson Rivera: Uh-huh.
> The Court: And you're sitting there? Are you aware of what's going on?
> Venireperson Rivera: Yes. I –I thought it was a murder.
> The Court: You have indicted murders in the grand jury.
> Venireperson Rivera: No.
> The Court: Ma'am, do you understand his question and what you're doing in the grand jury?
> Venireperson Rivera: Yes.
> The Court: Do you realize that whether you're looking at the defendant or not you are passing judgment and ordering a defendant to be standing trial for a felony? Do you realize what you're doing, or are you just signing off everything they stick in front of you?
> Venireperson Rivera: No. It's just, like, different cases.

The Court: *So as long as you don't know the defendant, you don't–you don't have a problem passing judgment? Have a seat, ma'am.*

R. 3:54-56. (emphasis added).

The second juror attempted to agree with the judge after a few questions, but she was still mocked and ridiculed by the judge and rudely told to sit down. A short while later, juror 40 attempted to ask a question regarding prior service that might affect her jury service, and she was cut off by the Judge and promptly accused of trying to get out of jury service. R. 3:57, 60, 66. Under these circumstances, jurors were unlikely to answer the litigants' questions truthfully for fear of reprisal from the judge.

If a trial court discourages prospective jurors from being truthful, he simultaneously destroys the purpose of the voir dire and erodes the foundation upon which a fair and impartial jury can be selected. *Price v. State*, 626 S.W.2d 833, 835–36 (Tex. App. – Corpus Christi 1981, no pet.). The fact that the judge, in this case, attempted to be subtle about his apparent dislike for jurors that did not agree with his opinions is no less dangerous, and arguably more dangerous, than a judge who outwardly threatens jurors with contempt, arrest or some other kind of obvious punishment. Jurors are frequently reluctant to speak during voir dire. While some jurors are more than willing to answer questions, the real difficulty in voir dire is getting quiet jurors to respond to questions asked and creating an atmosphere where jurors are ridiculed for their beliefs and their questions, serves no other purpose than

to instill fear in the minds of jurors that it is in their best interest to remain silent or run the risk of being publicly humiliated by a district court judge. *See Drake v. State*, 465 S.W.3d 759, 764 (Tex. App.—Houston, [14th Dist] 2015 no pet.). (While it is presumed that potential jurors answer the questions of voir dire truthfully, this presumption does not apply when jurors are given reason to fear reprisals for truthful responses.) "The purpose of the voir dire examination is to expose any bias or interest of the prospective jurors which might prevent full consideration of the evidence presented at trial. The term "voir dire" literally means "to speak the truth." Black's Law Dictionary (5th Ed. 1979). When one member of the panel does indeed speak the truth and exposes a personal bias, the interests of justice are served. Such honesty should be complimented and encouraged .... not ridiculed." *Price* at 835.

In its opinion, the 8th Court of Appeal states that because "no venire member was subjected to arrest, sanction, reprisal, or dismissed on religious grounds. The record does not reveal that the trial court's comments had a chilling effect on the jurors or deprived Appellant of a fair and impartial trial. Despite the trial court's comments, venire members continued to respond to questions posed by the State and defense counsel during voir dire." However, while it is presumed that potential jurors answer the questions of voir dire truthfully, this presumption does not apply when jurors are given reason to fear reprisals for truthful responses. *Drake v. State*, 465 S.W.3d 759, 764 (Tex. App.—Houston, [14th Dist] 2015 no pet.). Moreover,

reprisals do not have to include arrest or sanction. To be told by a District Judge in front of a group of community members that "*So as long as you don't know the defendant, you don't–you don't have a problem passing judgment? Have a seat, ma'am.*" Is a reprisal, embarrassment, and judgment by someone in a position of power that no member of any community would voluntarily endure. This type of error is reversible fundamental error and can be raised for the first time on appeal. *Id.* at 763. The trial judge's actions and remarks, in this case, cut off the vital flow of information from the jury to the court in such a way that it prevented Appellant from having a fair and impartial trial. Consequently, this court should reverse Appellant's conviction and sentence and remand his case for a new trial based on counsel's conflict of interest.

The affidavit that accompanied the motion for new trial, specifically showed the truth of the grounds asserted and reflected that reasonable grounds existed for a finding of ineffective assistance of counsel, a violation of due process, deprivation of the right to a fair and impartial jury and, the deprivation of the right to counsel. *Jordan v. State*, 883 S.W.2d 664, 665 (Tex.Crim.App.1994). As such, Appellant was entitled to a hearing on the issues raised in sections 3 and 4 of his motion for new trial. *King v. State*, 29 S.W.3d 556, 569 (Tex.Crim.App.2000).

A court of appeals must not affirm or reverse a judgment or dismiss an appeal if: (1) the trial court's erroneous action or failure or refusal to act prevents the proper

presentation of a case to the court of appeals; and (2) the trial court can correct its action or failure to act. Tex.R.App. P. 44.4(a). In such circumstances, the appellate court "must direct the trial court to correct the error" and "then proceed as if the erroneous action or failure to act had not occurred." Tex.R.App. P. 44.4(b).Texas Rule of Appellate Procedure 43.6 further provides that an appellate court "may make any other appropriate order that the law and nature of the case require." Tex.R.App. P. 43.6. S*ee also McIntire v. State*, 698 S.W.2d 652, 662 (Tex.Crim.App.1985) (op. on reh'g) (abating to determine feasibility of hearing on three-year-old motion for new trial) and *Crosson v. State*, 36 S.W.3d 642, 294 (Tex.App.-Houston [1st Dist.] 2000, order) (abating for suppression hearing, listing many similar situations for which abatement has been ordered). In this case, the complained of error may be corrected by directing the trial court to hold a hearing on Appellant's motion for new trial. Appellant requests that this Court abate the appeal and order the trial court to hold a hearing on his motion for new trial.

D. The 8th Court of Appeals erred in finding that Appellant waived his right to a hearing on a properly presented and filed motion for new trial

In this case, there is no legitimate reason to find waiver. Appellant timely filed a motion for new trial which contained detailed specific reasons for the relief requested. Appellant timely requested a hearing which was acknowledged by the trial court when it set a hearing on the motion. But then the trial court *sua sponte*

canceled the hearing. Ostensibly, it did so because Appellant's motion for new trial claimed that the trial court's behavior unfairly impacted trial counsel's performance and the trial court's behavior improperly chilled the honest exchange of information between potential jurors and the litigants. The 8th Court of Appeals opinion supports this supposition, as it points out that an affidavit attached to a motion for new trial is only a pleading and does not become evidence until introduced at a hearing as such. Opinion p. 9-10; *Jackson v. State*, 139 S.W.3d 7, 20 (Tex.App.--Fort Worth 2004, pet. ref'd). (To constitute evidence, the affidavit must be introduced as evidence at the hearing on the motion.) Had a hearing on the motion for new trial been held there would have existed evidence on the record of the trial court's improper behavior.

Under this set of circumstances, it serves no legitimate purpose to find waiver of Appellant's right to a hearing on his motion for a new trial. This 8th Court of Appeals acknowledges that Appellant timely filed a motion for new trial, that the motion was presented to the trial court in a timely manner and, that the motion was set for a hearing. The 8th Court of Appeals still chose to find waiver because the record does not show that Appellant attempted to reschedule the hearing after the trial court canceled it. The trial court's *sua sponte* cancellation of the hearing cannot undo Appellant's proper and timely preservation of an appellate complaint.

The 8th Court of Appeals relies on several cases that are inapplicable. In *Oestrick*, the defendant's motion for new trial was not presented to the trial court. *Oestrick v. State*, 939 S.W.2d 232, 235 (Tex.App.--Austin 1997, pet. ref'd) Therefore, even though the trial court failed to hold a hearing, there was no error shown absent some indication that the motion requesting a hearing had been properly presented to the trial court. *Id.* In this case, the motion was properly presented, and Appellant was entitled to a hearing. *See Vera v. State*, 868 S.W.2d 433, 435 (Tex.App.—San Antonio 1994, no pet.)(It is enough that the appellant requested a hearing, he was entitled to a hearing, and he was denied a hearing.)

In *Tello v. State*, although the court stated that there was no indication that appellant attempted to reschedule a canceled hearing, it did not find waiver. 138 S.W.3d 487, 496 (Tex. App. 2004), aff'd, 180 S.W.3d 150 (Tex. Crim. App. 2005). Instead, the 14th Court overruled appellant's point of error because it found that the 4 affidavits filed with the motion for new trial did not support a finding that counsel was ineffective. *Id.*

The trial court in *Johnson v. State*, actually gave the defendant a hearing, but the hearing was interrupted by a bomb threat. 925 S.W.2d 745, 748 (Tex. App. 1996). The continuation of the hearing, however, was scheduled outside the 75-day time frame in which the judge has to rule. *Id.* Johnson argued that there were special circumstances that merited an exception to the 75-day rule. *Id.* The appellate court

held that if Johnson wished to avail himself of some exception to the rule, it was incumbent upon him to show that the exception applied to him. *Id*. Since he had not done so, he was not entitled to relief. *Id.* No such claim is made here. Here Appellant followed the proper procedure for obtaining a hearing, and the trial court erred in failing to give him that hearing when it canceled the hearing it had initially set.

Similarly, in *Baker v. State*, the trial court was willing to give *Baker* a hearing, but the hearing was inadvertently set outside the 75-day time frame. 956 S.W.2d 19, 24 (Tex. Crim. App. 1997). The trial court's willingness to hold a hearing was evidenced by the fact that the hearing actually took place even though 75 days had already passed. *Id.* Baker did not object, and thus, the Court of Criminal Appeals held that he waived the issue. Consequently, Baker does not apply to this case.

E. Conclusion.

The 8th Court of Appeals reliance on waiver is simply wrong. The trial court was well aware of the issue before it. A timely motion for new trial raising legitimate issues of fact was presented to the trial court prompting the trial court to set the matter for a hearing. Yet by its opinion, the 8th Court of Appeals effectively allows the trial court to avoid ruling on the matter by engaging in gamesmanship. As pointed out above, no case explicitly requires an appellant to object if a trial court fails to hold a hearing that it had previously set. The import of the cases cited by the 8th Court of Appeals in support of its waiver holding is that motions for new trial

should be properly presented to the trial court and when the trial court inadvertently sets a matter outside the 75-day time frame, it is incumbent upon the appellant to point this out to the court. In a case such as this one, when it is the trial judge's conduct that is brought into question, it makes no sense to hold that appellant must do anything more than what he did in this case. *See Proenza v. State*, 541 S.W.3d 786, 799 (Tex. Crim. App. 2017)(When the trial judge's impartiality is the very thing that is brought into question, the typical justification for requiring contemporaneous objection is lessened.)

PRAYER FOR RELIEF

For all the above reasons, Appellant prays that his conviction and sentence be reversed and that he be granted a new trial. In the alternative, Appellant request that the instant appeal be abated and his case remanded to the trial court for a hearing on his motion for new trial. Appellant also prays for all other relief to which he is entitled in both equity and law.

Respectfully submitted,

/s/ Joe A. Spencer
JOE A. SPENCER
1009 Montana
El Paso, Texas 79902
915-532-5562
(915-532-7535) (Fax)
State Bar No. 18921800

CERTIFICATE OF COMPLIANCE

This document complies with the typeface requirements of Texas Rule of Appellate Procedure 9.4 because it has been prepared in a conventional typeface (Times New Roman font), with no smaller than 14 point font for text and 12 point font for footnotes.

I certify that this document in the above-captioned case was prepared with Microsoft Word for Windows, and that, according to the program's word-count function, the sections covered by Texas Rule of Appellate Procedure 9.4, contains 8,962 words, bringing this document into compliance with the word-count limitations of that Rule.

/s/ Joe A Spencer

CERTIFICATE OF SERVICE

Undersigned counsel hereby acknowledges that, on June 24, 2019, a copy of the foregoing documents was served, through his Appellate Division, on Mr. Jaime Esparza, District Attorney for the 34th Judicial District of Texas, via notification provided by the electronic filing notification service to DAAppeals@epcounty.com

/s/ Joe A. Spencer
Joe A. Spencer, Attorney